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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1113

OTTO HERMANN WILHELM MACKE, THERESA JOHANNA MULLER AND IRMGARD STURN,
Petitioners, Appellants Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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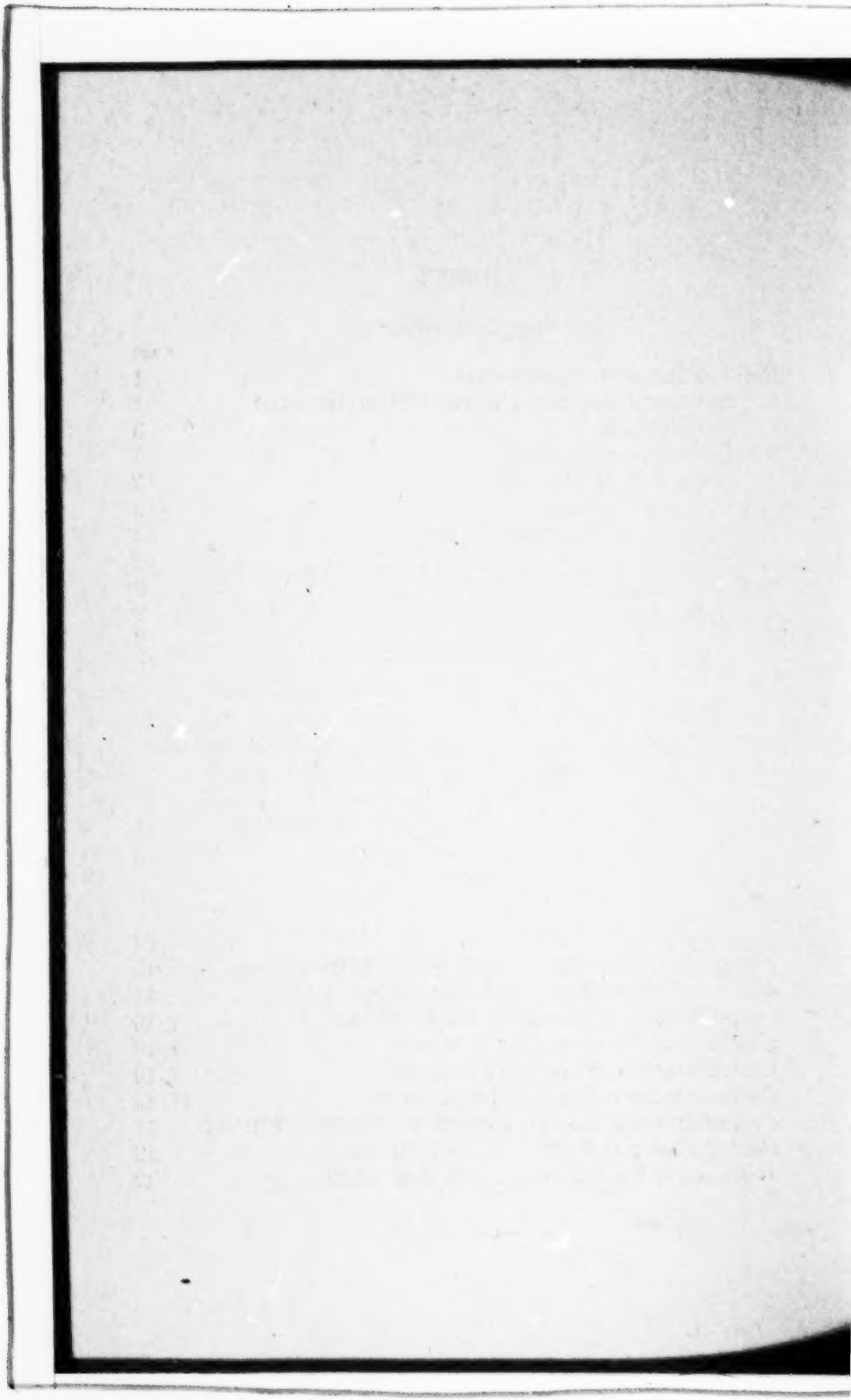

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I

Summary Statement of the Matter Involved

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit on the ground that the decision of the Circuit Court of Appeals as expressed in the opinion of that Court is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, and on the further ground that the

Court has decided a Federal question in a way which is in conflict with applicable decisions of this Court.

2. Petitioners, together with others, were indicted in the United States District Court for the Eastern District of New York, which indictment was filed on the 5th day of September, 1944. The indictment, containing one count, charged a conspiracy between the defendants and officers of the German Consulate in the City of New York to the end that the various defendants would violate the Alien Registration Act of 1940 (Title 8, U. S. C., Secs. 452, *et seq.*) in that they would falsify, deny and misrepresent that they, the defendants, were not members of the Nazi Party and in so doing, would defraud and obstruct the United States in obtaining accurate information as to their membership and activities in the Nazi Party, its clubs, organizations and their functions and activities in the United States in violation of Title 18, U. S. C., Sec. 88. The indictment charged that the alleged conspiracy was entered into on or about the 1st day of September, 1939, and continued up to the date of the filing of the indictment in September, 1944.

3. The case came on for trial in the United States District Court on October 25, 1944, in the City of Brooklyn in the Eastern District of New York and resulted in a conviction of petitioners and others on November 20, 1944. An appeal was taken to the United States Circuit Court of Appeals for the Second Circuit which Court reversed the decision of the District Court and returned the case to that Court for a new trial (*United States* v. *Ausmeier*, 152 Fed. 2d, 349). The case again came on for trial before the District Court in the Eastern District of New York on May 20, 1946 at which time fifteen of the co-defendants pleaded guilty and the trial proceeded only as against your petitioners. Petitioners were convicted and Macke was

sentenced to three months, Muller to six months and Sturn to thirty days imprisonment in the custody of the Attorney General.

4. An appeal from that judgment was taken to the United States Circuit Court of Appeals for the Second Circuit which Court, on the 7th day of February, 1947, affirmed the judgment of the District Court.

II

Jurisdiction

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

(2) The judgment of the Circuit Court of Appeals was entered February 7, 1947.

IIII

Questions Presented

1. May a conspiracy continue after the last overt act to effect its object has been committed?

2. Was the conspiracy proved on the trial of the indictment in the nistant case barred by the statute of limtiations?

3. Is it error in a charge of conspiracy to submit the case to a jury without instructing the jury on the distinction between proof of the conspiracy itself and proof of the connection of alleged co-conspirators therein?

IV

Statement of the Case

The names of the three petitioners, who are German Nationals, together with others, appeared on a list of names which was found among the records of the German Con-

sulate in New York City. The list was entitled "List of Persons who have applied for passports." A former employee of the Consulate named Lillian Illian, testified that this list had been made up from file cards of persons who were either prospective members or members of the Nazi Party. She did not know any of the defendants personally. She further testified that a Dr. Draeger, who was a Consular officer, instructed the members and prospective members not to disclose that they were members of the Nazi Party on the registration statements required to be filed under the Registration Act of 1940 (Title 8 U. S. C., Sec. 452 *et seq.*). Subsequently, but before the last registration statements were filed in December, 1940, the Consul sent out letters advising the various persons on the list that they should write to the Alien Registration Division of the Department of Justice to amend their registration statements to show that they were non-resident members of the National Socialist German Labor Party. There was additional testimony as to various gatherings and festivities held under the auspices of the German Consulate in New York City which two of the petitioners stated they had attended. Except for the enlargement of the proof of the activities of the German Consulate just mentioned, the proof on behalf of the government was substantially the same as the proof in the recent case decided in this Honorable Court entitled *Fiswick, et al.* v. *United States,* 91 L. Ed., p. 183, 328 U. S., p. —, No. 51, October Term, 1946. The Court permitted in evidence statements made by the three petitioners, Macke on November 6, 1943, Muller on November 18, 1943 and Sturn on July 21, 1944, without proper instructions to the jury as to the effect of these statements in their tendency to prove the conspiracy alleged in the indictment, the indictment stating that the conspiracy continued down to the filing thereof.

The last overt act in connection with the Alien Registration Act of 1940 alleged or proved occurred in December, 1940.

V

Statutes Involved

Title 8 U. S. C., Section 452(a) (in effect June 28, 1940):

> "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8 U. S. C., Section 453(a):

> "The application for the registration and fingerprinting, or for the registration of any alien who is in the United States on the effective date of such sections may be made at any time within four months after such date."

Title 8 U. S. C., Section 453(b):

> "No foreign government official, or member of his family, shall be required to be registered or fingerprinted under this chapter."

Title 8 U. S. C., Section 455(a):

> "The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this chapter. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General."

Title 8 U. S. C., Section 457(c):

"Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted within five years after entry into the United States shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in sections 155 and 156 of this title."

Title 18 U. S. C., Section 88:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Title 18 U. S. C., Section 582:

"*Offenses not capital.* No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed."

Title 18 U. S. C., Section 590 (a):

"*Suspension of limitations on offenses involving the defrauding of the United States.* The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termi-

nation or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

VI

Reason for Allowance of Writ

The decision of the Circuit Court of Appeals conflicts with the decisions of this Court in *Brown* v. *Elliott*, 225 U. S. 392; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Irvine*, 98 U. S. 450; *Fiswick* v. *United States*, 91 L. Ed. p. 183, 328 U. S. p. —, No. 51, October Term, 1946, and other representative cases and authorities cited in the argument, which hold that there should be a distinction between the continuance of a crime and the continuance of the result thereof.

In the case of *Fiswick* v. *United States, supra*, recently decided by this Court, which involved an indictment similar to the one in the instant case, this Court held that the conspiracy ended in 1940 instead of continuing until the time of the filing of the indictment as alleged therein. The failure of the trial court to charge this fact, so that the jury could properly determine whether proof of acts prior and up to that time were sufficient to prove a conspiracy, was error when substantial evidence of acts and statements

by alleged co-conspirators after that time were admitted without proper instructions to the jury.

In the *Fiswick* cas, *supra*, this Court held that the conspiracy ended with the filing of Alien Registration statements under the Act of 1940 when they were filed in December of that year. The indictment in the instant case, as in the Fiswick indictment, alleged that the conspiracy continued until the filing of the same. The statute of limitations was not raised nor could counsel be criticized for not raising it until the decision of this Court after the trial was completed. In view of the decision of this Court, had that defense been raised, it would have been effective.

WHEREFORE your petitioners pray that a writ of certiorari issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals, in the said case entitled in that court: United States of American vs. Otto Hermann Wilhelm Macke, Therese Johanna Muller and Irmgard Sturn, No. 166a, October Term, 1945, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

OTTO HERMANN WILHELM MACKE,
THERESA JOHNNA MULLER,
IRMGARD STURN,
By FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners.

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Circuit Court of Appeals appears at the end of the Record and has not yet been printed.

II

Statement of the Case

A full statement of the case is presented in the preceding Petition under Title IV.

III

ARGUMENT

Point I

(Questions (1) and (2))

Prosecution under this indictment was barred by the Statute of Limitations.

The indictment in the instant case is substantially the same in its allegations as the indictment in *Fiswick, et al.* v. *United States,* 91 L. Ed. p. 183, 328 U. S. p. —, No. 51, October Term, 1946. The only material change is the addition of three overt acts setting forth acts by alleged co-conspirators in February 1942 having to do with their applications for certificates of identification as aliens issued by the United States Department of Justice and not in any way connected with the Alien Registration Act of 1940 (Title 8, U. S. C. Sec. 452, *et seq.*). It has not been contended by the government in this case that the filing of these applications for certificates of identification in any way continued the conspiracy but rather the government has contended that the conspiracy continued down to the filing of the indictment as it did in *Fiswick* v. *United States, supra.* This Court has determined in the *Fiswick* case that the conspiracy ended with the filing of the Alien Registration statements in 1940. It is urged that the same situation exists in the instant case and the conspiracy ended in December 1940. (*Brown* v. *Elliott,* 225 U. S. 392; *United States* v. *Kissel,* 218 U. S. 601; *United States* v. *Irvine,* 98 U. S. 450.)

The Circuit Court of Appeals in *United States* v. *Ausmeier,* 152 Fed. 2d 349, which was the Circuit Court of Appeals decision following the first trial of the petitioners

herein held that "the conspiracy to defraud, if it existed, consisted of a conspiracy to have each defendant file a statement known by him to be false." There is no penalty provided in the Alien Registration Act of 1940 (Title 8 U. S. C. Sec. 452, *et seq.*) for defrauding the United States by filing a false registration statement. It would have been sufficient to plead and prove a conspiracy to wilfully file false registration statements. It must therefore follow that the allegations in connection with defrauding the United States were surplusage. (*United States* v. *Scharton*, 285 U. S. 518, 76 L. Ed. 917.)

If the conspiracy ended in December 1940 as has already been held by this Court, and the allegations concerning defrauding are surplusage, then the three-year statute of limitations (Title 18 U. S. C. 582) would apply, and not the broader statute of limitations (Title 18 U. S. C. 590a). But the appellate court will always look to the whole record and if there is apparent error, even though not raised at the trial, it will consider such error in the interests of justice. (*Miller* v. *United States*, 120 Fed. 2d 968 and *United States* v. *Levy*, 153 Fed 2d 995.)

Point II

(Question (3))

The trial court erred in its charge to the jury in that it did not distinguish between proof of a conspiracy and proof of a defendant's participation therein.

At the close of the government's case and during the argument following the introduction of the various exhibits (R. p. 362) the Court stated to the jury that the exhibits particularly affecting petitioners, such as registration certificates and statements taken by Federal Bureau of Investigation Agents, were offered only as against the

defendant named therein. Thereafter, the three petitioners took the witness stand and testified to substantially the same things that were in their statements. The Court, in its charge to the jury, made no distinction whatsoever between the evidence that had been produced by the government in an effort to prove the existence of a conspiracy and the various exhibits on which the names of the petitioners appeared as well as their testimony on the stand. It only charged (R. p. 526) "if, on the other hand you believe that the evidence adduced by the government convinces you of the existence of a conspiracy in the filing of a false registration known to contain false and material matter by these defendants, then your verdict must be guilty." A careful examination of the court's charge shows nothing to counteract the effect of this statement and certainly a casual remark made to a jury on the argument of a long motion two days before, would not be sufficient to overcome it. Although the error was not quite as apparent as that of the trial judge in the *Fiswick* case, nevertheless, the failure of a judge to properly charge a jury is reversible error whether objected to or not. (*United States* v. *Levy, supra; United States* v. *Noble,* 155 Fed. 2d 315; *Williams* v. *United States,* 131 Fed. 2d 21.)

The proof of the conspiracy in the *Fiswick* case was substantially the same as the proof in the instant case. The only difference was that the trial court allowed the government to go somewhat further in the proof in showing parties and festivities held under the auspices of the German Consulate. It is hard to see how such proof would bolster the charge of a conspiracy born sometime after the festivities had ceased. The trial court in the *Fiswick* case, in effect, laid the whole body of all of the evidence that had accrued up to the time of the indictment in the laps of the jurors and instructed them to see if there was a conspiracy from

all that they had heard at the trial. The Court, in the instant case, did the same thing. This Court has said that the government's proof in the *Fiswick* case was "weak." In view of the conditions that were present, the petitioners, to obtain a proper trial, were entitled to definite instructions to the jury as to what portion of the evidence had to do with proving the government's allegations that a conspiracy existed and what part their own acts and statements, whether produced by the government or not, affected the charge alleged in the indictment. This was not done.

Conclusion

Your petitioners respectfully submit that the Circuit Court of Appeals for the Second Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeals and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioners.

(9543)